
CANADA / JUDGMENT

Roy v. 1216393 Ontario Inc.

2012 BCSC 1752

COURT

Supreme Court of British Columbia

DECIDED

23 November 2012

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2012 BCSC 1752 Roy v. 1216393 Ontario Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roy v. 1216393 Ontario Inc.,

2012 BCSC 1752

Date: 20121123

Docket: 76210

Registry: Kelowna

Between:

Richard Roy and Diane Roy

Plaintiffs

And

1216393 Ontario Inc. and Dennis Kretschmer

also known as Dennis Kretschner

Defendants

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Plaintiffs:

J. Grant Hardwick

Counsel for the Defendants:

P. Daniel Le Dressay

Place and Date of Trial:

Kelowna, B.C.

October 10-12 and 15-17, 2012

Place and Date of Judgment:

Kelowna, B.C.

November 23, 2012

INTRODUCTION

- [1] This action arises out of the plaintiffs' purchase of a strata lot ("Lot 33") in a housing development known as The Property of Crystal Waters (the "Development"). The Development is located on Kalamalka Lake, south of Vernon, B.C. It is situated in the District of Lake Country. Lot 33 was sold as bare land in the anticipation that the plaintiffs would construct a residence on the lot through Mr. Kretschmer's company, Tylon Steepe Development Corporation ("Tylon Steepe"). The sale did not complete due to a successful action for specific performance by the prior purchasers of Lot 33, Mr. and Mrs. Adams, (the "Adams") and the plaintiffs now claim damages for breach of contract against 1216393 Ontario Inc. (the "Company"). They also seek damages against Mr. Kretschmer personally for deceit. The plaintiffs' original statement of claim was for specific performance and damages in the alternative, implicitly for breach of contract. The original claim did not include an action in deceit against Mr. Kretschmer. The claim was amended in April 2009, with leave of the Court, to add this new cause of action against Mr. Kretschmer.
- [2] This action has had a long history. The trial was first heard in March 2011 by Josephson J. who issued a judgment in favour of the plaintiffs with respect to the claim for damages against the Company but dismissed the claim against Mr. Kretschmer: *Roy v. 1216393 Ontario Inc.*, 2011 BCSC 465. The defendants appealed and the plaintiffs cross appealed the judgment. The Court of Appeal found the trial judge erred and ordered a new trial of the action against both defendants: 2011 BCCA 500 [Roy].
- [3] The issue addressed by the Court of Appeal regarding the claim against the Company involved the interpretation of the deposit clause contained in the purchase agreement for Lot 33. In particular, whether the deposit clause limited the plaintiffs' damages to the amount of their deposit. While the trial judge held the Company could not rely on the deposit clause because it would be unconscionable, the Court of Appeal disagreed. Their reasoning is found at paras. 28-31 of the judgment:

[28] The Vendor's ground of appeal is that the trial judge erred in finding the exclusion clause to be unconscionable because he failed to consider the positions of the parties when they entered into the contract for the purchase and sale of Lot 33. With respect, I am compelled to agree.

[29] The Vendor has cited several case and text authorities discussing the elements of unconscionability. It is sufficient for our purposes to set out the following from the reasons of Madam Justice McLachlin (as she then was) in *Principal Investments Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 at 263, 37 D.L.R. (4th) 398 (C.A.):

Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrison v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).

[30] It is apparent from the comments of Binnie J. at para. 122 of *Tercon* (quoted above) that he was not intending to signal a departure from the usual test for unconscionability.

[31] In the present case, the judge only considered the second of the two elements referred to by McLachlin J. The effect of the judge considering only the fairness of the exclusion clause was to apply the construction (fundamental breach) approach used by the trial judge in the *Romfo* case, which has now been laid to rest by the Supreme Court of Canada in *Tercon Contractors*.

[4] The Court of Appeal went on to order a new trial for the reasons cited at paras. 32-33 of the judgment:

[32] The Vendor requests that the action be dismissed as a result of the judge's error. In response, the plaintiffs say we should find that they were in a distinctly unequal bargaining position by the time they entered into the contract in August 2005 because they had sold their house and the market was rising. Alternatively, the plaintiffs ask us to apply the public policy exception encompassed in the third leg of the analytical approach set out in *Tercon Contractors* as a result of the conduct of Mr. Kretschmer that they categorize as egregious fraud. Also in the alternative, the plaintiffs rely on *1018429 Ontario Inc. v. Fea Investments Ltd.* (1999), 179 D.L.R. (4th) 268, 27 R.P.R. (3d) 1 (Ont. C.A.), and other cases for the proposition that a party who makes a fraudulent misrepresentation at the time of contract formation cannot rely on an exclusion or limitation clause in the contract.

[33] I agree the appeal must be allowed on the ground advanced by the Vendor, but would order a new trial to permit the adjudication of the issues raised by the parties. Each of those issues would require this Court to make findings of fact that were not made by the trial judge. For

example, the misrepresentation found by the judge to have been made by Mr. Kretschmer occurred after the formation of the contract, and he made no findings with respect to Mr. Kretschmer's non-disclosure or the relative bargaining positions of the parties at the time the parties entered into the contract. Although I am reluctant to subject the parties to the costs of a new trial, I do not believe that it would be appropriate for us to draw the inferences and make the findings urged by the parties on the basis of the record before us: see *Whiting v. First Data Canada Merchant Solutions ULC*, 2011 BCCA 84 at para. 21. It should be done by a trial judge after hearing the evidence of the parties.

- [5] The claim against Mr. Kretschmer was dismissed at trial because Josephson J. held that the plaintiffs did not rely on his false misrepresentations to their detriment. The Court of Appeal ordered a new trial with regard to the claim against Mr. Kretschmer for the reasons found at paras. 37-39 of the judgment:
- [37] ... His [the trial judge] point was that the plaintiffs did not do anything differently in the six-month period between the time they learned the true reason for the delay in the completion of their purchase of Lot 33 and the time they commenced their action, and the error does not detract from that point.
- [38] However, it appears that in reaching his conclusion, the judge was not satisfied that the plaintiffs discharged the burden of proof because he stated that the evidence did not establish "on the balance of probabilities" that the plaintiffs were induced to act to their detriment. The judge's attention was not drawn to the decision of this Court in *Sidhu Estate v. Bains*, [1996] 10 W.W.R. 590, 25 B.C.L.R. (3d) 41 (C.A.), where, after reviewing the two lines of competing authority, Mr. Justice Finch (as he then was), on behalf of the Court, concluded:
- [42] I think the preferred view of the law in Canada is that once intention, materiality and causation of loss are proven, the burden of proving non-reliance shifts to the defendant.
- [39] Hence, the onus had shifted to Mr. Kretschmer to prove that the plaintiffs did not rely on his false statement to their detriment. On my reading of his reasons, I am not persuaded that the judge would necessarily have reached the same conclusion if he had appreciated that the onus was on Mr. Kretschmer.
- [6] Subsequent to the Court of Appeal judgment there were two mistrials at the commencement of the retrial of the plaintiffs' claims. These mistrials occurred in April 2012 before Betton J. and in September 2012 before Rogers J.
- [7] The defendants acknowledge that the Company breached the contract with the plaintiffs for the purchase of Lot 33 because they were unable to complete due to the successful claim to title by the Adams. However, the defendants maintain that the plaintiffs are bound by the liquidated damage clause in the contract, which term limits their damages to the return of their deposit equal to 10% of the purchase price.

- [8] In regard to the claim against Mr. Kretschmer, the defendants maintain there were no false or misleading statements made to the plaintiffs. In the alternative, the defendants argue the plaintiffs did not rely on any false representations to their detriment and affirmed the contract knowing the true facts.

BACKGROUND

- [9] Mr. Kretschmer has been a contractor and developer for many years. He started his own company in Alberta and his first project in B.C. was the Development. In 1998, Mr. Kretschmer became interested in the Development site and discovered that it was owned by the Company, whose principal, Mr. Ho, resided in Toronto. Through negotiations with Mr. Ho, it was agreed that Tylon Steepe and Mr. Kretschmer would purchase the property from the Company and they (Mr. Ho and Mr. Kretschmer) would jointly develop the site. The contract stipulated a fixed price for the property in excess of \$2 million. By 2004, the contract price increased to over \$3 million due to delays in the progress of the Development.
- [10] Mr. Kretschmer was solely responsible for managing the Development in B.C. The plaintiffs' dealings were exclusively with Mr. Kretschmer; they had no contact with Mr. Ho or with Mr. Law who was Mr. Ho's representative located in Calgary. Mr. Kretschmer's responsibilities included all the physical work on the site as well as obtaining approvals from the District of Lake Country for the development permit and the subdivision plan.
- [11] In 2002 and 2003, Mr. Kretschmer began to market the Development with signs posted at the site. On July 31, 2002, Mr. Kretschmer issued a disclosure statement for the Development as required by the Real Estate Act, R.S.B.C. 1996, c. 397, as repealed by the Real Estate Services Act, S.B.C. 2004, c. 42. The 2002 Disclosure Statement described the Development in para. 1.05 as follows:

The Development will be a single phase Bare Land Strata development consisting of 34 Bare Land Strata lots. Of the 34 Bare Land Strata lots, 24 will be designated as single family, 9 will be designated as duplex lots and 1 will be designated as a triplex lot. The Developer reserves the right to sell the duplex and triplex lots as single family lots if and when the Developer chooses....

- [12] The 2002 Disclosure Statement attached a letter dated May 30, 2000 from the District of Lake Country that indicated the development permit for the property had been granted subject to several conditions, many of which would be challenged by the developer. There was no subdivision plan for the Development at this time.
- [13] The 2002 Disclosure Statement also included the standard form of contract to be executed by the purchaser and the vendor at the time of sale. The terms of the contract were not subject to negotiations by individual purchasers. The contracts required a 10% deposit at the time of execution to be held by the vendor's solicitor and the balance of the purchase price was to be paid on the completion date. There was no fixed completion date in the contract. Instead, completion would occur no more than ten business days after the vendor notified the purchaser that the strata plan had been fully registered in the Land Title Office (clause 2.1).

The contract also contained the following terms regarding the deposit and the vendor's inability to complete the sale:

1.2 Payment of the Deposit by the Vendor's Solicitor: In respect of the Deposit, the Vendor's Solicitor (and for the purposes of this clause, Fraser and Company shall be considered the "Vendor's Solicitor" if it holds the Deposit) is authorized:

...

(b) unless precluded by Court order, shall pay the Deposit:

...

(iii) to the Purchaser as liquidated damages and as the Purchaser's sole remedy without further recourse against the Vendor, if the purchase and sale contemplated by the Agreement is not completed by reason of the Vendor's default hereunder; or

(iv) subject to clause 7.8, to the Vendor, without prejudice to any other right or remedy of the Vendor, if the purchase and sale contemplated by the Agreement is not completed by reason of the Purchaser's default hereunder.

[14] The 2002 Disclosure Statement was approved by the Superintendent of Real Estate under the Real Estate Development Marketing Act, S.B.C. 2004, c. 41; however, the Superintendent disclaims liability for any statements in the disclosure documents that are filed with the registry. The Superintendent does not concern itself with the accuracy of statements or the legality of contractual terms.

[15] All of the strata lots within the Development were pre-sold to purchasers by the early part of 2003. The only remaining lot was Lot 33. This lot was to be the site of a "spec home" and would be sold after its completion. However, in the summer of 2003, Mr. Kretschmer was approached by the Adams in regard to the purchase of Lot 33 as a bare strata lot. Mr. Kretschmer advised them that the lot was not for sale at that time but their continued importuning led to a sale of this lot on August 14, 2003. The purchase price was \$172,700 and the Adams provided Mr. Kretschmer with a deposit cheque in the amount of \$17,270. The vendors did not execute this contract until September 10, 2003, as Mr. Law was located in Calgary and the documents had to be sent to him for execution after the Adams. Mr. Kretschmer signed the contract upon its return from Calgary.

[16] In 2003, the District of Lake Country had not yet approved the subdivision plan for the Development. As a result of the delays and frustrations created by the intransigence of the District's staff, the Company and Tylon Steepe commenced two actions against the District of Lake Country and various council officers in April and December 2003. Difficulties in dealing with the District's staff regarding the subdivision plan continued to plague Mr. Kretschmer into 2004. In one of the actions, the defendants sought summary judgment; however, no other steps were taken in the lawsuits beyond the pleadings stage. Despite the lack of subdivision approval, Mr. Kretschmer continued to market the Development throughout

2003.

- [17] Due to the financial risks associated with the Development, the contracts signed by purchasers contained a clause permitting the developers to cancel the agreement and return the purchaser's deposit if they did not obtain subdivision approval by a certain date. The vendor had to give notice under this clause by a date specified in the agreement. This provision is distinct from the deposit term in clause 1.2.
- [18] By letter dated July 15, 2004, Mr. Salloum, counsel for the Company and Tylon Steepe, wrote to the Adams and purported to cancel their purchase agreement regarding Lot 33. Mr. Kretschmer acknowledged that he instructed his lawyer to send this letter. The reason for the cancellation was stated to be delays in the approval of the subdivision plan by the District of Lake Country. Further, the letter stipulated that the Company and Tylon Steepe relied on clause 2.3 of the purchase contract, which permitted cancellation for acts beyond the control of the vendor that essentially frustrated completion of the sale.
- [19] While Mr. Kretschmer and the Company admitted that it was too late to cancel the Adams' contract pursuant to clause 2.3, and that the cancellation was therefore a nullity, Mr. Kretschmer testified that he acted on legal advice received at the time that he could properly cancel the contract pursuant to this provision. Mr. Kretschmer also testified that the cancellation of the Adams' contract was in reality motivated by their attempts to sell Lot 33 to a third party on the internet, which was not the reason specified in the cancellation letter. Mr. Kretschmer was very upset when he learned of their efforts to "flip" the property and decided to terminate their contract as a consequence of their actions. He agreed that the terms of the contract signed by the Adams permitted them to sell Lot 33 to third parties (clause 6.4).
- [20] In response to the letter of July 15, 2004, the Adams retained legal counsel who contacted Mr. Salloum on their behalf. Further, on July 21, 2004, Mr. Adams hand delivered a letter to Mr. Salloum indicating that they were not accepting the cancellation of their contract. In particular, Mr. Adams wrote:

I am writing on behalf of my wife, Roxana Adams and myself regarding your letter dated July 15, 2004. We still want our transaction for lot # 33 to go through. During the past year we received a number of promises when title could be registered. We have been patiently awaiting that event while regularly maintaining contact with the Vendor. It is my understanding that title will be registered very soon.

Based on promises made throughout this past year we believe that our agreement is valid and enforceable. If the Vendor persists in pursuing cancellation of our agreement then you will be hearing from our lawyer.

- [21] The Adams' deposit was returned to them and they cashed it on January 21, 2005, writing "cashed under protest" on the reverse side of the cheque. This fact was brought to Mr. Kretschmer's attention in late February 2005. Mr. Kretschmer testified that he did not hear

from the Adams again until his counsel advised him in December 2005 that they had commenced an action against the Company, Tylon Steepe and Mr. Kretschmer personally. However, as discussed below, Mr. Kretschmer knew the Adams were protesting the cancellation of their contract in the fall of 2005, shortly after the plaintiffs signed their contract for the purchase of Lot 33.

- [22] Throughout 2005, Mr. Kretschmer and the Company sent the same cancellation letters to several purchasers, including the Romfos, the Fairweathers, the Cunninghams, and David Perrella. The reason given for the cancellation was the delay by the District of Lake Country in the subdivision approval process. Prior to receiving these letters, the purchasers were given an opportunity to re-purchase the same lots at a significantly higher price. The Royers were offered a price of \$598,000 whereas the original price of their lot was \$245,000. The same lot was offered to the Shamins for \$759,000. The purchasers would also be required to sign a new contract with altered terms that required them to retain Tylon Steepe to construct their homes on the lots. The contract did not limit the price for construction of homes or set out a formula for calculating the price. The new terms also gave Tylon Steepe an option to re-purchase the lot at the original price if the purchaser did not build within 2.5 years from the date of registration of the subdivision plan.
- [23] These new terms were contained in a revised Disclosure Statement that was issued on June 10, 2005. While some purchasers accepted the new terms offered by Mr. Kretschmer, a number of them refused and commenced an action for specific performance and damages against the Company, Tylon Steepe, and Mr. Kretschmer personally. This multiple plaintiff action was filed in this court on January 9, 2006: *Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1375 (the "Romfo Action").
- [24] In response to an application by the plaintiffs in this action, I held that the defendants were precluded from re-litigating and calling evidence to contradict the findings of the court in the Romfo Action and that by mid-August 2005 the defendants knew that approval of the subdivision plan by the District of Lake Country was imminent and, at the same time, Mr. Kretschmer misrepresented the truth to the purchasers in the Romfo Action by advising them that the vendors could not proceed with their contracts due to governmental delay in the subdivision approval process. In this regard, the admissions made by the defendants' counsel in the Romfo Action found at paras. 209-211 of the judgment are instructive:
- [209] I mentioned earlier (at para. 185) that originally the defendants relied on delay caused by government action and clause 5.2. When faced with a document production motion with respect to the vendors' dealings with the District, the defendants amended their defence to remove this plea. The defendants' document production and the scope of the examinations for discovery were based on the premise that the issue of whether the vendors made reasonable efforts to obtain the subdivision approvals was irrelevant because they admitted they were in breach of the agreement.

- [210] But, as will be explained below, the vendors' lack of mutuality argument depends, in part, on clause 5.2. Therefore, the amendment was allowed on the basis that the defendants could rely on the fact that clause 5.2 was in the contract, but that it was not properly invoked. In other words, it was to be assumed that the vendors did not make reasonable efforts to effect the subdivision.
- [211] It was also to be assumed that Mr. Kretschmer's representations to the vendors that the subdivision registration was delayed because of difficulties with the District had no factual foundation. To use the terminology of counsel for the defendant in his submissions regarding the amendment, it was to be assumed that Mr. Kretschmer's representations to the defendants with respect to governmental delay were "a pack of lies".
- [25] On December 13, 2005, the District of Lake Country gave final approval to the subdivision plan for the Development. It was deposited in the Kamloops Land Title Office on December 23, 2005 and was registered on January 16, 2006.
- [26] It is against this background that I turn to Mr. Kretschmer's dealings with the plaintiffs.

THE ROYS' PURCHASE OF LOT 33

- [27] Mr. Roy was semi-retired in 2004; he worked part time as a tractor-trailer driver hauling equipment and materials in B.C. and in the Western United States. He was previously in business as a heavy equipment and semi-trailer operator and had owned a convenience store in Vernon. He has a Grade 12 education and is currently 66 years old. Mrs. Roy is a few years younger than Mr. Roy. She had worked in the family's convenience store and had a part time job at the local golf club.
- [28] In 2004, the plaintiffs lived in Coldstream, which is a community near Vernon, in a home they owned on Hillside Drive. Their Hillside home had four bedrooms, a yard and an outdoor pool. The plaintiffs had no immediate plans to sell their home; however, their plans for retirement included downsizing to a low maintenance property, such as a condominium, to facilitate travel away from home for extended periods of time. Mrs. Roy was more interested in a condominium than her husband; but in 2004 she was content with her Hillside home and had no immediate plans to sell it.
- [29] The plaintiffs had known Mr. Kretschmer through friends for several years. Mrs. Roy's brother, David Hazard, was also a friend of Mr. Kretschmer. The plaintiffs met Mr. Kretschmer on a camping trip that they attended along with Mrs. Roy's brother and other acquaintances. It was sometime in 2003 that the plaintiffs first learned that Mr. Kretschmer was marketing and managing the Development on Kalamalka Lake. At that time the Development was just "a pile of dirt" and the plaintiffs were not interested in purchasing a lot in the subdivision even though they knew that Mr. Hazard had purchased one of the lots in the Development. However, in early 2004, the Development began to take shape with the construction of roads and a dock and the plaintiffs became more interested in a possible purchase of a lot. Mrs. Roy believed living on the lake would be nice for her children and her

grandchildren.

- [30] When the plaintiffs first heard about the Development in 2003, Mr. Kretschmer advised them that all of the lots had been pre-sold. It was later in 2004 when they began to be interested in purchasing one of the lots, that Mr. Kretschmer told them that some of the lots were coming back into inventory. One of the lots that had now become available was Lot 33. What Mr. Kretschmer told the plaintiffs about the Adams' contract cancellation prior to the signing of the contract and the circumstances surrounding Mr. Kretschmer's commitment to sell them Lot 33 are in dispute.
- [31] Mr. Kretschmer testified that it was not until after the plaintiffs sold their home in March 2005 that they expressed any real interest in buying Lot 33. At this time he advised the plaintiffs that there would be a new disclosure statement coming out and a re-pricing of the lots to reflect only a fraction of their increased market value. He also told the plaintiffs that the re-priced lots would be offered first to the prior purchasers. At the end of May 2005, he sent them the 2002 Disclosure Statement and confirmed a discussion about the changes in the contract. Mr. Kretschmer testified that he told the plaintiffs during their pre-contract discussions that there was a legal challenge by the Adams concerning Lot 33, but he had a legal opinion that he could nevertheless sell this lot. I find this evidence is inconsistent with Mr. Kretschmer's testimony that he only knew of the Adams' challenge in the fall of 2005 and did not tell the plaintiffs about the Adams' lawsuit until December 2005. It is also inconsistent with Mr. Kretschmer's evidence in cross-examination that before the plaintiffs signed the contract he did not advise them that the Adams were contesting the cancellation of their contract and had cashed their deposit cheque under protest. I note that during the trial before Josephson J., Mr. Kretschmer testified that the first time he named the Adams in discussions with the plaintiffs was in January 2006.
- [32] Mr. Roy testified that Mr. Kretschmer did not provide him with the details surrounding the purchase of Lot 33 by the Adams. All Mr. Roy was told was that the lot became available due to improper marketing on the internet by the prior purchaser. Mr. Roy denied that he knew any other details surrounding the purchase of the lot by the Adams before he signed the contract. However, during his examination for discovery in March 2009, Mr. Roy acknowledged that Mr. Kretschmer told him lots were becoming available because he had raised the price of the lots sold to some purchasers and they were not willing to come up with the extra money. While Mr. Roy denied that he knew the Adams' contract had been cancelled, during the trial before Josephson J. he testified that he knew some contracts had been cancelled and the prices increased. He also agreed that he knew a letter had been sent to the prior purchasers but did not know the contents of the letter and was never told the name of the prior purchasers of Lot 33. Ultimately, Mr. Roy agreed with his examination for discovery evidence that he knew the prior purchasers of Lot 33 were sent a cancellation letter. During the trial before Rogers J., Mr. Roy testified that he knew nothing of why Lot 33 had come back into inventory and he acknowledged that this was not true; however, shortly before this trial Mr. Roy underwent heart surgery and was not in a good state of health at

this time. He simply forgot the other details about the prior purchasers that were disclosed to him by Mr. Kretschmer due to memory difficulties caused by the heart surgery.

- [33] Mrs. Roy testified that she left most of the discussions about the lot to Mr. Roy and Mr. Kretschmer. However, she knew that Lot 33 had come back into inventory because the prior purchasers had tried to sell it on the internet. She did not know who the prior purchasers were.
- [34] I find the plaintiffs were told that their lot had come back into inventory because the contract with the prior purchaser had been cancelled due to their attempts to sell the lot on the internet. Mr. Kretschmer also advised the plaintiffs that the lots were being offered at a higher price and on new contractual terms. He did not advise the plaintiffs of any other specifics about the cancellation of the Adams' contract. Nor did he name the Adams as the prior purchasers of Lot 33. While there are problems with inconsistencies in Mr. Roy's testimony on this matter, it is apparent that Mr. Kretschmer has exaggerated the information he provided the plaintiffs about the Adams' challenge before they signed the contract. Based on his testimony at this trial, he did not advise the plaintiffs of the Adams' litigation until December 2005. Further, his evidence that he shared the Adams' decision to contest the cancellation of their contract with the plaintiffs in their preliminary discussions in 2005 is inconsistent with his testimony that he had heard nothing from the Adams since July 2004 and assumed they were not challenging the cancellation.
- [35] Mr. Roy testified that in 2004 when they expressed interest in Lot 33, Mr. Kretschmer said he needed to have a commitment right away because there were many others interested in the lot. They discussed the price and \$184,700 was settled upon. In the spring or early summer of 2004, the parties came to an oral understanding that the plaintiffs would purchase Lot 33 for this price. Mr. Kretschmer agreed that he discussed Lot 33 with the plaintiffs in 2004; however, he denied that he had entered into an oral commitment concerning the sale of the lot at any time. Both Mr. and Mrs. Roy testified that Mr. Kretschmer gave them an oral commitment to sell them Lot 33 and they acted on the faith of that representation by placing their Hillside home on the market in the fall of 2004. They could not afford to own the home and purchase Lot 33 at the same time. During the summer of 2004, Mrs. Roy went to the site on several occasions to admire Lot 33 and to show the property to her children and grandchildren. In August 2004, Mrs. Roy appears on a home video showing her lot to some of her grandchildren. She turns to the lot and points to where her home is going to be constructed. While Mr. Kretschmer disputed the date of the video, its date was the subject of an admission by counsel.

- [36] On March 7, 2005, the plaintiffs accepted an offer to purchase their Hillside home for \$321,000. The sale completed on May 27, 2005 and the plaintiffs moved into a basement suite in a home owned by Mrs. Roy's mother. While Mrs. Roy was cross-examined on her motives for selling the Hillside home, I accept her evidence that her plans to retire and live in a smaller place were in the future and that this was not a material factor in the decision to sell the home in the spring of 2005.
- [37] The plaintiffs' evidence concerning the oral commitment by Mr. Kretschmer makes sense in the circumstances. I accept they had no immediate plans to sell their home and yet they put it on the market in the fall of 2004 and accepted an offer in March 2005, long before they signed a contract with the defendants. I am satisfied that the plaintiffs would not have sold their home and moved into a basement suite if they had not secured a commitment from Mr. Kretschmer to sell them Lot 33. While there may have been an interest in a condominium in 2004, I find that this was something the plaintiffs considered for their retirement and was not the underlying reason for the sale of their Hillside home. Further, in light of the overwhelming interest in the Development, it is highly improbable that Mr. Kretschmer would have kept Lot 33 in his inventory for this lengthy period of time if he had made no verbal commitment to his friends. Thus I prefer the plaintiffs' testimony on this point.
- [38] During this period, Mr. Kretschmer continued to keep the plaintiffs informed of the delays caused by the District of Lake Country regarding the subdivision plan. Mr. Kretschmer told the plaintiffs that these delays were the reason he was not in any rush to have them sign a contract immediately after they came to an agreement on the price for Lot 33. Mr. Kretschmer agreed that during 2005 he continued to struggle with the approval process and there seemed to be no end to the problems created by the District. In an email to the plaintiffs (dated May 29, 2005), in which he attached a copy of the 2002 Disclosure Statement, Mr. Kretschmer referred to the troubles he was having with the District. He told the plaintiffs that a new disclosure statement would be forthcoming that "reflects the new crap that the district imposed".
- [39] The parties finally entered into an agreement in the summer of 2005. There is no dispute that the plaintiffs were advised of a new disclosure statement and of the changes to the contract before they signed the purchase agreement. Further, Mr. Kretschmer provided a bound copy of the 2005 Disclosure Statement to the plaintiffs prior to the execution of the agreement. There is a dispute, however, about when the contract was signed. The plaintiffs testified that they received the 2005 Disclosure Statement when they signed the contract on July 26, 2005. On the same day, Mrs. Roy executed a deposit cheque dated July 26th with the year omitted and gave this cheque to Mr. Kretschmer.
- [40] Mr. Kretschmer testified that he provided the plaintiffs with the 2005 Disclosure Statement on July 26th, the same day as he received the deposit cheque. The contract was not executed by the plaintiffs until August 10, 2005, which is the same date as the Company and Mr. Kretschmer signed it. Mr. Kretschmer testified that his practice was to hold back the

disclosure statements until a prospective purchaser committed to the project with a deposit cheque. That is why the plaintiffs' deposit cheque has a different date from the date on the contract.

- [41] On balance, I prefer the plaintiffs' evidence that they signed the contract and received the 2005 Disclosure Statement on July 26, 2005. After the plaintiffs signed the purchase agreement, it had to be sent to Calgary for execution by Mr. Law. Thus, by necessity, Mr. Law would have signed it on a date subsequent to the plaintiffs' execution of the contract. Mr. Kretschmer's practice of holding back the disclosure statements until a deposit cheque was received appears not to have been applied to the plaintiffs because he sent them the 2002 Disclosure Statement on May 29, 2005. I also find it improbable that a prospective purchaser would provide the developer with a deposit cheque before signing a contract and before reviewing the terms of the proposed contract included in a disclosure statement. The plaintiffs also received pre-approval for construction financing on August 2, 2005, which would have been premature if they had not already signed an agreement to purchase Lot 33. Lastly, the plaintiffs started working with a home designer approved by Mr. Kretschmer prior to August 2005.
- [42] Mr. Roy agreed that when he signed the contract to purchase Lot 33, he read its terms and signed it knowing what it said. He testified, however, that there was little choice but to sign the contract whatever its terms because they had sold their home in a rising real estate market and could not afford to give up Lot 33 and purchase something else due to the increase in property values. They were living in a basement suite, which was very inconvenient. The contract terms could not be negotiated; it was a "take it or leave it deal". Of concern was that there was no limit on how much Tylon Steepe could charge for constructing their home. Mr. Roy also felt bound by his oral commitment to purchase the lot. Mr. Roy denied that Mr. Kretschmer made sure they read over the contract. When he expressed concern about its terms, Mr. Kretschmer said their only choice was not to sign. The terms could not be altered. Mrs. Roy testified that she left the business aspects of the contract to her husband but she relied on Mr. Kretschmer as a friend and a businessman. She could not recall reading the contract; she believed it was the culmination of their oral commitment to buy the lot.
- [43] Mr. Kretschmer also testified about the signing of the contract. His testimony, however, is suspect because the plaintiffs were not cross-examined on any of the statements he allegedly made before the contract was executed. In this regard, Mr. Kretschmer testified that he asked the plaintiffs if they received legal advice about the contract and offered that they could do this first. He also testified that each clause was explained to them before the contract was executed. Neither of these important statements was put to the plaintiffs in cross-examination. Thus the weight to be applied to this evidence is nominal.
- [44] After the plaintiffs signed the contract, they wanted to start construction of their home as soon as possible because they were living in a small basement suite and the price of home construction was rising quickly. While they were content to use Tylon Steepe as their

contractor, they knew that delay would only increase the costs of building a new home. Mr. Kretschmer advised the plaintiffs that construction could not begin until the subdivision plan had been approved and the District of Lake Country continued to be unreasonable and dilatory.

- [45] Notwithstanding the delay in construction pending approval of the subdivision plan, the plaintiffs took steps towards completion of the purchase and the building of a house on Lot 33. Mr. Roy retained legal counsel (Nixon Wenger LLP) for the conveyance and obtained pre-approval for mortgage financing up to \$390,000. The plaintiffs retained Mullins Drafting & Design ("Mullins"), on Mr. Kretschmer's recommendation, to draw up plans for the house even before the contract was signed. The first drawings were created on August 4, 2005. Mullins wanted a \$2,000 deposit for this work and an invoice in this amount was presented to the plaintiffs by Mr. Kretschmer on August 10, 2005. On the same date, Mrs. Roy gave Mr. Kretschmer a cheque for \$2,000 payable to Tylon Steepe and Mr. Kretschmer paid Mullins the monies. Drawings for the house were discussed, drafted and redrafted from early August 2005 until late April 2006. Email correspondence between the parties and Mullins, as well as the drawings in evidence, corroborate this timeframe.
- [46] In the fall of 2005, the plaintiffs were advised by Mr. Kretschmer that it was not feasible to have them into their new home by Christmas 2005 due to the delays with the subdivision plan approval process. Accordingly, the plaintiffs left B.C. on an extended vacation. They travelled across Canada in a recreational vehicle and visited their daughter in the U.S. The plaintiffs did not return to Vernon until December 2005. From time to time, Mr. Roy used a pay telephone to call Mr. Kretschmer and during these calls he was advised that the District of Lake Country continued to delay approval of the subdivision plan. Mr. Roy agreed that in or about November 2005 Mr. Kretschmer told him over the telephone that a new mayor had been elected for the District of Lake Country and this had raised his hopes about finally getting subdivision approval. He denied that Mr. Kretschmer called him to advise that Mrs. Roy's deposit cheque was deficient due to her failure to put the year on the date. Mr. Roy testified that this issue never came up until the first trial.
- [47] Mrs. Roy also testified that the defective deposit cheque was not brought to her attention. The first she learned of this problem was at the trial before Josephson J. Although she knew the cheque had not been cashed, Mrs. Roy raised this issue with Mr. Kretschmer in December 2005 when they returned from the U.S. and he said they would address this matter when it was time to complete the contract. She testified that in December 2005 design work continued for the home on Lot 33 and Mullins sent her several drawings that were nearing completion. Mr. Kretschmer was also involved in the design process because he had to approve the plans. She was never told that the construction had to be delayed due to a claim by the prior purchasers.
- [48] Mr. Kretschmer testified that he did not send the plaintiffs' deposit cheque to the lawyers for the Development to be held in trust because there was no year on the date. He also testified that in a telephone call with Mr. Roy while they were out of town during the fall of 2005, he

told them of the need to correct the cheque. However, during his examination for discovery in June 2008, Mr. Kretschmer testified that while normally the deposit cheques were sent to the lawyers within two weeks or sooner, he did not forward the plaintiffs' cheque to the lawyers because he knew of the Adams' challenge to the cancellation of their purchase contract. The missing year was never mentioned as a reason for holding back the deposit cheque.

- [49] It was also in the fall of 2005 that Mr. Kretschmer and the Company cancelled the purchase contracts of many prior purchasers, including Mr. Roy's brother-in-law, Mr. Hazard. Mr. Hazard signed a new contract that completed in February 2006. Mr. Roy testified that he knew nothing about the cancellation of Mr. Hazard's contract due to their limited contact with him. Mrs. Roy also testified that she did not discuss this type of business matter with her brother who lived in Alberta. However, Mrs. Roy conceded that she was aware that her brother signed a new contract at a higher price and that this fact could have come to her attention in 2006. Mr. Roy knew one other prior purchaser; however, he was only an acquaintance and he did not advise Mr. Roy that his contract had been cancelled.
- [50] Mr. Kretschmer testified that during a telephone call with Mrs. Roy in December 2005, while the plaintiffs were away on vacation, he advised them that the Adams were contesting the cancellation of their contract and, as a consequence, they could not proceed with their purchase until the matter was resolved. When he met with the plaintiffs in early January 2006, it was their wish to continue with the design process until the \$2,000 was used up and then wait and see regarding the Adams' claim to Lot 33. Mr. Kretschmer testified that the plaintiffs said very little about the Adams' suit and he told them the Adams had a weak case. Mr. Kretschmer at no time sent the plaintiffs written confirmation of the lawsuit or the Company's inability to complete the contract. While the defendants had possession of the plaintiffs' computers for two years for the purpose of forensic analysis, no evidence was led that indicated they had knowledge of the Adams' claims. The plaintiffs deny that Mr. Kretschmer advised them of the Adams' claim. Mr. Roy and Mrs. Roy testified that they would never have continued to spend money and time on design work for a home that they may not be able to build.
- [51] Mr. Roy testified that by the summer of 2006 they were under full construction at the Development site and owners were visiting the site on a regular basis to view the work by Tylon Steepe. Houses were being constructed; there was framing and basements going in. However, in cross-examination he only reluctantly agreed that two building permits had been issued for construction in all of 2006, which was his testimony in the trial before Josephson J. There were only four houses being constructed on the site by November 2007.
- [52] The plaintiffs testified that in April 2006 they met with Mr. Kretschmer on the site to discuss the possibility of building dormers on the house to obtain a partial view. The only problems with the conveyance raised by Mr. Kretschmer were those with the District of Lake Country, including the lake boundaries, overhang and the railway easement. Mr. Kretschmer also indicated that due to easement and overhang issues with Lot 33, which was the entry lot into

the subdivision, the drawings for the home may have to be changed. As a consequence, Mr. Roy decided not to continue with the design process until these issues were resolved. The plaintiffs testified that at this time Mr. Kretschmer did not advise them that the subdivision plan had been registered. The final drawings received from Mullins came in late April 2006.

- [53] Mr. Roy agreed that he went to the Development site in late spring 2006 but there was no home construction going on at that time which may have alerted him to the fact that the subdivision plans had been approved and purchasers were completing their conveyances. He did not visit the site in the summer of 2006 when there were two houses under construction. While Mr. Hazard completed his purchase sometime in 2006, Mr. Roy did not discuss this matter with him. Mrs. Roy also visited the site on several occasions in 2006 and saw a couple of basements being constructed. She did not think anything of this and assumed that it was her lot that was being held up due to problems with the District. Mrs. Roy continued to rely on Mr. Kretschmer's representations that the contract could not complete due to delays caused by the District. It did not register with her that the District must have approved the subdivision plan if other people were building on their lots.
- [54] The plaintiffs left Vernon in the spring of 2006 and took a trip to Nevada and Oklahoma where their daughter resides. On their return in the fall of 2006, Mr. Roy worked part time as a long distance hauler and Mrs. Roy accompanied him on some of his trips. Mrs. Roy remained in Texas during the summer of 2006 and did not return to Vernon until September of that year. In late 2006, the plaintiffs went to Texas to visit their son and did not return until April 2007.
- [55] During the fall of 2006 they remained in touch with Mr. Kretschmer regarding Lot 33 and they met on several occasions in a social setting. Mr. Kretschmer continued to raise the same problems with the Development; the District of Lake Country would not approve the subdivision plan. During their meetings Mr. Kretschmer referred to his lawsuit against the District for damages arising out of their delay during the subdivision approval process. The plaintiffs denied that Mr. Kretschmer referred to the Romfo Action during these meetings. Because construction costs had increased substantially since the plaintiffs signed their contract for Lot 33, Mr. Roy asked Mr. Kretschmer if they could tag along in the lawsuit against the District and claim their damages due to the delay. Mr. Kretschmer said he would ask his lawyers about the matter. Mr. Kretschmer had not responded to the plaintiffs' request when they left for Texas in December 2006. As a consequence, Mrs. Roy emailed him on December 27, 2006 to obtain his response. That email says, in part:

Called and left message with phone number ... on Dec 24th to see if you had been in touch with your lawyer, and what his response was in regards to passing on damages in event that you win the court case in April.... have you heard anything or been in touch with him yet?

- [56] Mr. Kretschmer did not respond to her email. He testified that it was the Romfo Action that was discussed in the meetings with the plaintiffs during the fall of 2006 and not his actions against the District. The plaintiffs wanted to claim damages in the Romfo Action. Mr.

Kretschmer also testified that he advised the plaintiffs that their lawyers, Nixon Wenger LLP, were acting for the Adams in this action and that they would have to retain new counsel. The plaintiffs were not cross-examined on this version of the events. Mr. Kretschmer also testified that Mr. Roy called him while in Texas to say that he had confirmed with Nixon Wenger LLP that they could not continue to act for him. Mr. Roy was not cross-examined about this conversation. During his cross-examination, Mr. Kretschmer agreed that he had discussed with the plaintiffs the litigation against the District concerning the subdivision plan.

- [57] Mr. Roy testified that he was concerned enough about the impact of the delay on the price of constructing a home to seek legal advice about starting his own action against the District of Lake Country. To that end he called Nixon Wenger LLP in early December 2006 and subsequently received a call back from Mr. Kermode of Nixon Wenger LLP on December 11, 2006. The plaintiffs were still in Texas at this time. During this conversation Mr. Roy learned that the law firm likely could not act for him due to a conflict of interest but had to get back to him with the details. He denied that during this conversation he learned about the Adams or any specifics surrounding the Romfo Action. Mr. Kermode sent Mr. Roy an email shortly thereafter but the plaintiffs could not open the attachments. As a consequence, the plaintiffs asked Nixon Wenger LLP to send the attachments by mail. They received a letter dated December 13, 2006 and the enclosing letter dated January 9, 2007 sometime later in January. The December 13, 2006 letter said, in part:

Since I spoke with Richard on December 11, 2006, I have been in touch with the lawyer representing the group which includes the Adams, who previously made an accepted but conditional offer on lot 33. A certificate of pending litigation is registered against lot 33 and other lots in the subdivision. The attached decision arises in those proceedings. Paragraph 39 refers to the Adams.

The lawyer advises that a trial of this proceeding is to take place in April 2007 over a period of four weeks.

- [58] Mr. Roy testified that when he received this letter he learned for the first time that the problems associated with his purchase of Lot 33 were not related to the District. He discovered the identity of the prior purchasers of Lot 33 and that they had sued the defendants on the contract. Mr. Roy tried to contact Mr. Kretschmer on several occasions by telephone and finally reached him in late January 2007. He expressed unhappiness at Mr. Kretschmer's failure to disclose the competing claim by the Adams in unpleasant words. In response, Mr. Kretschmer said that the claim would get resolved; that the Adams did not have a good case and he was going to be successful in his defence of the lawsuit. Mr. Roy testified that he believed he had no choice but to accept what Mr. Kretschmer said and wait for the results of the Adams' lawsuit. The plaintiffs did not have sufficient funds to give up Lot 33 and purchase another property. The property values had skyrocketed over this period of time in the Vernon area. Moreover, Mr. Roy believed there was nothing they could do until they returned to Vernon in April 2007.

- [59] Mrs. Roy testified that she also found out for the first time in January 2007 that the Adams were contesting the cancellation of their contract. Before this time she had no knowledge of the Adams or their lawsuit. While she was unsure of when she learned of the Adams during examination for discovery in March 2009, Mrs. Roy believed that she had a better recollection of this matter now. Further, she testified that discussions with other people involved in lawsuits arising out of the Development have not influenced her recollection of the events. Mrs. Roy testified that if she knew her property was in jeopardy, she would not have left the country for four months. Mrs. Roy also testified that Mr. Kretschmer told them to "hang in there" regarding Lot 33 because the Adams did not have a case and their action would be dismissed. This conversation occurred sometime in January 2007 when she and Mr. Roy were in Texas. She felt that they had no choice but to wait and see whether the Adams' action was successful. They could not buy another lot without knowing whether they were still obligated to purchase Lot 33 and they could not afford to purchase another property because the prices of property and construction were now so much higher than in 2004.
- [60] An appraisal of Lot 33 by Nick Lonsdale indicates that as of August 2005 the land had a market value of \$200,000. Mr. Lonsdale's appraisal of Lot 33 as of November 2007 indicated the land had a market value of \$500,000. Mr. Lonsdale's appraisal of Lot 33 also indicates construction costs as of August 2005 at \$100 per square foot and his appraisal of Lot 33 as of November 2007 indicates construction costs of \$140 per square foot.
- [61] Mr. Kretschmer denied that the plaintiffs accused him of lying about the state of title to Lot 33. He first learned of their claims in 2009 when they sought to amend their statement of claim. He testified that when Mrs. Roy told him they were suing he was not surprised. While he agreed making a statement to the effect that they had no contract, Mr. Kretschmer testified that this was a reference to what his partner would say. At the trial before Josephson J., Mr. Kretschmer agreed that he said these words without any reference to his partner's position.
- [62] After January 2007, the plaintiffs kept in touch with Mr. Kretschmer concerning the Romfo Action and he continued to advise them that it was going well and he was going to be successful. Mr. Roy testified that he relied on Mr. Kretschmer's opinion that the Adams' litigation would not be successful and his statements that their defence to the action was going well. As a consequence, the plaintiffs chose to keep monitoring the Romfo Action to see how it turned out. They also continued to socialize with Mr. Kretschmer and his wife on a few occasions to safeguard their interest in Lot 33 when they returned to Vernon at the end of April 2007. Mr. Roy testified at the trial before Rogers J. that he continued to socialize with Mr. Kretschmer during this period; however, he maintained it was only in a limited way and not frequently.
- [63] In July 2007, however, the plaintiffs decided they needed to protect their own legal position and instructed legal counsel to commence an action against the defendants for specific performance and, in the alternative, damages for breach of contract. The action and a

certificate of pending litigation ("CPL") were filed on July 26, 2007. After Mrs. Roy advised Mr. Kretschmer of this lawsuit, the parties had no further contact with each other. During this telephone call, Mr. Kretschmer got very angry and told Mrs. Roy that she did not have a contract anymore.

- [64] On September 14, 2007, Meyers J. issued a judgment in favour of the plaintiffs, including the Adams, in the Romfo Action. He ordered specific performance of the contracts. Notwithstanding this loss, Mr. Kretschmer encouraged the plaintiffs to continue to have their money ready because he was appealing the judgment. On April 30, 2008, the Court of Appeal dismissed Mr. Kretschmer's appeal: *Romfo v. 1216393 Ontario Inc.*, 2008 BCCA 179. When the appeal was dismissed, the plaintiffs recognized that they had to give up Lot 33 and became resigned to claiming damages against the defendants rather than specific performance. They moved out of the basement suite and relocated to the Lower Mainland to go into business with their son.
- [65] The plaintiffs testified that if they had known about the Adams' claim against Lot 33 they would never have sold their home or committed to purchasing the lot. The value of their home in April 2008, according to Mr. Lonsdale's appraisal, was \$575,000. They would never have committed a great deal of time and effort to the design process for the home to be constructed on Lot 33 or paid \$2,000 for drawings had they known of the Adams' claim. The plaintiffs also testified that they relied on Mr. Kretschmer's representations that it was problems with the District that delayed completion of their purchase and construction of their home.

SIMILAR FACT EVIDENCE

- [66] Marilyn Shamin and her daughter Shelley Shamin became interested in purchasing a lot in the Development in the spring of 2005; however, she learned that there were no lots available. They had been pre-sold. However, Mr. Kretschmer indicated there may be four lots coming up for sale. In the fall of 2005 she received notice from Mr. Kretschmer dated October 21, 2005, which indicated four lots were now on the market. She was interested in Lot 1 which had a sale price of \$759,700. Before entering into a contract and issuing a deposit cheque to the developer, Mrs. Shamin and her daughter reviewed the 2005 Disclosure Statement. They subsequently met with Mr. Kretschmer and gave him a cheque for 10% of the contract price and signed the contract. Neither Mr. Kretschmer nor the Company signed the contract at that time. Mr. Kretschmer said that the agreement had to be executed by his partner in Calgary and thereafter he would forward an executed copy of the contract to her.
- [67] Mrs. Shamin never received a copy of her contract. She and her daughter telephoned Mr. Kretschmer to inquire when they could complete the purchase. His response was that the transactions were held up by litigation with the District of Lake Country. In cross-examination, Mrs. Shamin agreed she could have had only one conversation with Mr. Kretschmer after signing the contract and that this conversation could have been in 2006 or

2007. She adamantly denied that any other litigation was disclosed to her in conversation with Mr. Kretschmer. After waiting a long time for some notice from Mr. Kretschmer that they could complete, in 2008 Mrs. Shamin drove to the Development site and made inquiries of an owner who was building on his lot. She learned from this owner that some of the lots were subject to litigation. Mrs. Shamin was never advised by Mr. Kretschmer that Lot 1 was the subject of a lawsuit by the first purchaser. When she learned of the lawsuit against Lot 1, Mrs. Shamin attempted to contact Mr. Kretschmer; however, he did not return her calls.

- [68] Mrs. Shamin did not file any claim against the defendants regarding Lot 1. Her deposit cheque became stale dated and she never received a call from Mr. Kretschmer to update it. Mrs. Shamin denied that Mr. Kretschmer called her in December 2005 to ask her to pick up her cheque.
- [69] Shelley Shamin testified that she and her mother became interested in purchasing a lot in the Development in 2005. They flew to Kelowna and took a walk around the site. Coincidentally Mr. Kretschmer was on site and he indicated there were no lots for sale at the moment but there was a possibility that additional lots would be available for sale sometime in the future. In October 2005, she and her mother received a notice from Mr. Kretschmer that four lots were now available for sale. They decided to purchase Lot 1 for \$759,700. They attended Mr. Kretschmer's office and signed a contract to purchase Lot 1. Mr. Kretschmer also signed the contract but indicated that it had to be sent to Calgary for signature by the developer and when the contract was fully executed, it would be forwarded to them. At this meeting Ms. Shamin's mother gave Mr. Kretschmer a deposit cheque dated October 24, 2005. Ms. Shamin assumed they now had a valid contract and was never advised otherwise by Mr. Kretschmer. Ms. Shamin denied that she ever received a call asking her or her mother to pick up the deposit cheque.
- [70] At this meeting Mr. Kretschmer told them the completion of the sale would have to be delayed due to legal problems related to the District of Lake Country. The Shamins never received an executed contract and were not contacted by Mr. Kretschmer to complete the transaction. Ms. Shamin telephoned Mr. Kretschmer several times and spoke to him on a couple of occasions in 2006 and 2007. During these telephone calls Mr. Kretschmer continued to maintain that the completion of the sale was held up with litigation involving the District of Lake Country.
- [71] After two years of waiting for notice to complete, Ms. Shamin and her mother attended the Development site and spoke to people there. She recalled Mr. Landon in particular. Mr. Landon said there were liens on the property and encouraged her to contact Mr. Fairweather who knew more about the situation. Ms. Shamin telephoned Mr. Fairweather who advised her that all of the lots had been pre-sold and the developer was involved in litigation with the prior purchasers, including the purchasers of Lot 1. At no time did Mr. Kretschmer advise Ms. Shamin of this litigation. Although she attempted to reach Mr. Kretschmer after learning of this litigation, he did not return her calls.

- [72] Neither Ms. Shamin nor her mother was acquainted with the plaintiffs before being contacted to give evidence in the trial before Josephson J.
- [73] Mr. Kretschmer testified that when he met the Shamins on the site in August or September 2005, he told them the majority of the lots were sold; however, there was going to be a re-pricing with some purchasers and some of them may not wish to complete. The Shamins asked him to let them know if any waterfront lots became available. Later he sent them a list of four lots for sale.
- [74] At the meeting to sign the contract, Mr. Kretschmer only witnessed the document, he did not sign it. He told the Shamins that the contract had to be sent to Calgary for Mr. Law to sign. When the contract came back to his office, Mr. Kretschmer noted that it was signed on behalf of the Company but he did not sign it because he knew of the litigation concerning Lot 1. Mr. Kretschmer testified that he called Mrs. Shamin and explained that there was a legal challenge on Lot 1 so he could not complete the sale. He said her deposit cheque would be left at the front desk of his office for her to pick up. Although the cheque was never picked up, Mr. Kretschmer said that he assumed it had been and did not ask about it.
- [75] Mr. Kretschmer testified that Ms. Shamin contacted him after signing the contract and he told her that the purchase could not go through until the litigation involving Lot 1 was resolved. He had no further telephone contact with her. However, at the trial before Josephson J., Mr. Kretschmer testified that he had four telephone calls with Mrs. Shamin or Ms. Shamin. In cross-examination, Mr. Kretschmer said that he received the Shamins' deposit cheque before they signed the contract when they were given a disclosure statement. I note that the Shamins were not cross-examined on this matter. Mr. Kretschmer also testified that he did not send the Shamins' deposit cheque to the lawyers for the Development because he knew of the legal challenge on the lot.

ARGUMENT

- [76] The plaintiffs argue that where there are differences between their evidence and that of Mr. Kretschmer, their version of the events should be preferred. The plaintiffs maintain their evidence is credible, straightforward, and logical. They also argue that their evidence is supported by the independent testimony of the Shamins whose evidence was not shaken in cross-examination. In contrast, the plaintiffs say that Mr. Kretschmer has given false testimony in collateral litigation and has been found to have lied to the first tier purchasers about the true reason for the delay in completion of their contracts. He has also given inconsistent evidence in this trial on material points, including when he became aware of the Adams' challenge to cancellation of their contract. Moreover, the plaintiffs say it is telling that the defendants have never documented their purported disclosures to the plaintiffs concerning the controversy over Lot 33.

- [77] In support of the admission of the evidence of the Shamins, the plaintiffs rely upon *J.G. v. Tyhurst*, 2003 BCCA 224 [Tyhurst] and *R. v. Handy*, 2002 SCC 56. The plaintiffs rely upon *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.) and point to the findings of Ballance J. in *Tylon Steepe Homes Ltd. v. Pont*, 2011 BCSC 385 at para. 24 that Meyers J. dealt a heavy blow to Mr. Kretschmer's credibility.
- [78] In regard to the tort of deceit and the plaintiffs' claim against Mr. Kretschmer, the plaintiffs argue all the elements of the claim have been proven. Mr. Kretschmer made false representations to the plaintiffs regarding the reason they could not complete their contract to purchase Lot 33. This false representation was intended to deceive the plaintiffs and prevent them from suing the defendants on the contract. The false statement materially induced the plaintiffs to act to their detriment. In support of this argument the plaintiffs rely upon *Derry v. Peek* (1889), [1886-1890] All E.R. 1 (H.L.). The plaintiffs say the false representations led them to wait years to complete their contract and to give up an opportunity to consider purchasing alternate property. The false representations also induced the plaintiffs to refrain from taking legal advice in a timely way and to spend money on design work on a house that may never be built. By the time the plaintiffs were made aware of the true facts, it was too late for them to get back into the market due to the drastic increase in property prices and construction costs.
- [79] The plaintiffs argue that the onus rests with Mr. Kretschmer to prove that they did not rely on his false representations to their detriment: *Sidhu Estate v. Bains* (1996), 25 B.C.L.R. (3d) 41 at para. 42 (C.A.). Further, the plaintiffs argue that a limited liability clause such as the one contained in their contract for the purchase of Lot 33 does not protect an agent such as Mr. Kretschmer who commits the tort of deceit: *Dodds v. Millman* (1964), 45 D.L.R. (2d) 472 (B.C.S.C.) at 477.
- [80] In regard to the breach of contract claim, the plaintiffs say the defendants have admitted to breaching the contract entered into for the purchase of Lot 33 by failing to complete. The issue is whether clause 1.2(b) applies to limit the liability of the defendants to the return of the purchasers' deposit. The plaintiffs agree that clause 1.2(b) applies but argue that based on the tests set out in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras. 121-123, this clause cannot exclude the defendants from liability for all of the damages suffered by the plaintiffs.
- [81] The plaintiffs say the circumstances in which they entered the contract make it unconscionable to enforce the contract and enforcement would be contrary to public policy. In particular, the plaintiffs say that when they entered into the contract they were in a disadvantaged bargaining position because they had been committed to purchasing the lot for over a year and had sold their home on the faith of that commitment. The price of property and construction costs had increased between the sale of their home and the signing of the contract making it very difficult for them to refuse to sign and purchase another lot. The purchasers were living in a basement suite and were anxious to have their own home again. The contract had onerous terms regarding the construction of their home

that had not been previously disclosed to them and the terms of the contract were not negotiable.

- [82] The plaintiffs argue that if unconscionability is not made out, the egregious fraud by Mr. Kretschmer, as agent for the Company, renders it against public policy to enforce the limited liability clause. While the false representations occurred after the contract was signed, the plaintiffs maintain that public policy reasons can stem from later conduct: *Tercon* at para. 120.
- [83] While the plaintiffs did not immediately sue for breach of contract, they commenced an action for specific performance shortly after their return from Texas. The claim for damages is also contained in this statement of claim. The plaintiffs say in the circumstances there is no affirmation of the contract.
- [84] The plaintiffs claim damages for breach of contract based upon the loss of a property and home worth \$930,000 according to Mr. Lonsdale's 2007 appraisal. Alternatively, the plaintiffs claim damages based on the difference in value of their Hillside home between the date of sale and the date of breach. They argue the date of breach is April 2008 when the Court of Appeal upheld the Adams' claim to specific performance of Lot 33. In the further alternative, the plaintiffs claim they are entitled to the increase in value of Lot 33 between the date of the contract and the date of the breach: *Johnson v. Agnew*, [1980] A.C. 367 at 401 (H.L.). The plaintiffs also argue they are entitled to be reimbursed for the \$2,000 they spent on design costs.
- [85] The plaintiffs claim damages for deceit on the same basis as breach of contract. Had Mr. Kretschmer advised the plaintiffs of the claim against Lot 33 immediately, they could have elected to purchase another property. Thus damages should reflect the increase in the value of Lot 33 as bare land or alternatively as improved land.
- [86] Lastly, the plaintiffs say that the defendants' argument regarding affirmation of the contract is in reality a claim that they failed to mitigate. The plaintiffs say the onus of proof regarding mitigation rests with the defendants: *Red Deer College v. Michaels* (1975), [1976] 2 S.C.R. 324 at 331-332. The plaintiffs say that the only reasonable course of action was to wait until the Court of Appeal determined the rights of the Adams to Lot 33 before abandoning their claim for specific performance. Further, the plaintiffs say they did not have the financial means to mitigate by purchasing another comparable property: *Yee v. Pro-Western Management Ltd.*, [1998] B.C.J. No. 942 at para. 56 (S.C.); *Karod v. Lingstrom* (1983), 30 R.P.R. 1 at 16 (B.C.S.C.); and *Mann v. Bains*, 2006 BCSC 837 at para. 34.
- [87] In regard to the claim for breach of contract, the defendants argue the plaintiffs have never pleaded damages in lieu of specific performance; however the trial proceeded as a claim for damages. Thus it must be presumed that they elected at trial to claim damages and abandoned the claim for specific performance. With that assumption, it follows that the plaintiffs accepted the vendors' repudiation of the contract, which they argue is an affirmation of the contract. Affirmation of the contract, says the defendants, goes to the

claim in deceit: Mr. Justice Sharpe, *Injunctions and Specific Performance*, (Aurora: Canada Law Book, 2007) at paras. 10-700-10-880.

- [88] While the defendants agree that they breached the contract, they argue that clause 1.2(b) limits the plaintiffs' damages to the return of their deposit. Further, they argue there is no basis for excluding the plaintiffs' circumstances from the application of this clause because the contract was not unconscionable at the time it was signed. Further, they argue the actions of Mr. Kretschmer, even if regarded as fraud, are not a sufficiently egregious act to exclude the plaintiffs from the operation of the clause.
- [89] In regard to the claim in deceit, the defendants argue that Mr. Kretschmer did not make any false representations to the plaintiffs. Alternatively, if he is found to have lied to the plaintiffs, the defendants argue the plaintiffs did not rely on the false representations to their detriment and with full knowledge of the deception affirmed the contract, which precludes reliance on the deceit.
- [90] Regarding the credibility of the witnesses, the defendants say that Mr. Roy's evidence should not be believed due to the fact that he admittedly lied to Rogers J. Further, the defendants say Mr. Roy's evidence that he knew nothing of the Adams' claim to Lot 33 is inconsistent with his brother-in-law's experience with the Development, the correspondence in December 2006 from Nixon Wenger LLP, his failure to accuse Mr. Kretschmer of lying until the pleadings were amended in 2009, and his desire to continue socializing with Mr. Kretschmer after he discovered the true facts. The defendants say that Mrs. Roy relied on her husband and took little interest in what Mr. Kretschmer said about the property. Notwithstanding the alleged deceit, she continued to socialize with Mr. Kretschmer. On the other hand, the defendants argue that Mr. Kretschmer has given consistent testimony throughout these lengthy proceedings and his evidence was not shaken in cross-examination. His evidence concerning the disclosures to the plaintiffs about the Adams' litigation is logical and consistent with the probabilities. The story told by the plaintiffs, in contrast, is not reasonable.
- [91] Addressing the application of the deposit clause, the defendants argue that there is no evidence that as a matter of contract formation the contract was unconscionable in the sense of a lack of consensus between the parties: *Hunter Engineering Company Inc. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 431; *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (C.A.) at 173; *Principal Investments Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 at 263 (C.A.); and *Roy* at para. 29. The defendants say there is no evidence that the plaintiffs were in the power of the defendants when they signed the contract; that there was unequal bargaining power; or that they were under distress or ignorant of the terms of the bargain. There is also no evidence of unfairness in the bargain: *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at para. 31.

- [92] The defendants say that the plaintiffs have not proven facts that would create a public policy reason for excluding them from the impact of their bargain. Simple fraud is not enough given the examples given by Binnie J. in *Tercon* at paras. 118-119. Mr. Kretschmer's actions, even accepting the plaintiffs' evidence, are not egregious fraud. Further, the defendants say that the Superintendent of Real Estate approved the terms of the contract. Thus the deposit clause should not be found inapplicable for public policy reasons.
- [93] The defendants argue there was no deceit after the contract was signed and urge the court to accept Mr. Kretschmer's evidence. However, even if he deceived the plaintiffs, the defendants say they affirmed the contract by waiting until the Court of Appeal dismissed the defendants' appeal before suing for damages. Having affirmed the contract, it puts an end to the claim of deceit: *Sorensen v. Kaye Holdings Ltd.* (1979), 14 B.C.L.R. 204 (C.A.). There can be no inducement to their detriment if they affirmed the contract: *Burrows v. Burke* (1984), 49 O.R. (2d) 76 at 77 (C.A.); *K.R.M. Construction Ltd. v. British Columbia Railway Company* (1981), 18 C.L.R. 159 at 169 at 253 (B.C.S.C.) varied on other grounds (1982), 40 B.C.L.R. 1 (C.A.) [K.R.M.]; and Phillip Osborne, *The Law of Torts*, 3rd ed. (Toronto: Irwin Law Inc., 2007) at 300.
- [94] In regard to damages for deceit, the defendants claim the appraisals by Mr. Lonsdale are irrelevant. The plaintiffs have not provided a theory upon which damages could be based.
- [95] Lastly, the defendants argue the Shamins' evidence should not be admitted in the trial. There is little probative value to the evidence and it does not outweigh the prejudice to the defendants. The Shamins' evidence concerns a different set of facts because they never had a contract. Their evidence is also vague as to what Mr. Kretschmer allegedly told them about the reasons for delay.

DECISION

A. Credibility

- [96] For the reasons given earlier, I accept the plaintiffs' evidence that prior to signing the contract for Lot 33 in August 2005 they knew that there had been prior purchasers whose contract was cancelled due to attempts to sell the property on the internet. The plaintiffs did not know the name of the prior purchasers or that they had disputed or challenged the cancellation of their contract. As far as the plaintiffs knew, the defendants had a legal right to sell Lot 33 to them in August 2005. Also for the reasons given earlier, I accept the plaintiffs' evidence that they and Mr. Kretschmer entered into an oral commitment to buy the property in 2004 and, based on that commitment, the plaintiffs marketed and sold their Hillside home. I rejected Mr. Kretschmer's testimony in both these matters due to serious inconsistencies in his version of the events and the improbabilities inherent in his evidence. This finding bears on my assessment of his credibility regarding the statements he made to the plaintiffs after the contract was signed.

- [97] I have also made a preliminary ruling that Mr. Kretschmer cannot re-litigate the findings of Meyers J. that he lied to the first tier purchasers about the reason for the delay in the completion of their contracts and cancelled their contracts under false pretences. In particular, Mr. Kretschmer falsely advised the purchasers that it was delays caused by the District of Lake Country in approving the subdivision plan that led to the cancellation of their contracts. Meyers J. also concluded that Mr. Kretschmer knew that the statements he made to the purchasers concerning the District were false at the time.
- [98] I am also satisfied that it is appropriate to consider the similar fact evidence of the Shamins to assess Mr. Kretschmer's credibility. The Shamins' evidence is highly relevant. They are unrelated to the plaintiffs and had no knowledge of them until well after this litigation commenced. They were in precisely the same circumstances as the plaintiffs; that is, they were purchasing a lot in the Development that had been sold to a prior purchaser and the lot had now "come back into inventory" and was being marketed by the vendors. They testified that Mr. Kretschmer told them after the contract was signed that completion of the conveyance was delayed due to legal problems and litigation with the District of Lake Country. At no time did Mr. Kretschmer advise them that the prior purchasers of Lot 1 were contesting the cancellation of their contract. Mr. Kretschmer's decision not to sign the contract is not a distinguishing factor; it is the parallel nature of the representations made to the Shamins and the plaintiffs as secondary purchasers that makes this similar fact evidence. Moreover, I accept the Shamins' evidence that they were never told that they had no enforceable contract or told to pick up their deposit cheque. In my view, the Shamins' evidence establishes a pattern of conduct by Mr. Kretschmer that is entirely inconsistent with his version of the events surrounding the plaintiffs' purchase of Lot 33.
- [99] Similar fact evidence is exceptionally admissible where its probative value is so high that it outweighs the prejudice caused by propensity reasoning: Tyhurst at para. 18. A trial judge must first decide the probative value of the evidence and then the "moral and reasoning prejudice the defendant[s] will suffer from its admission". The trial judge must go on to balance these two factors to ensure a fair trial: Tyhurst at para. 19.
- [100] In this case, there is no possibility of collusion because the Shamins did not know the plaintiffs and have no interest in this lawsuit themselves. They are truly independent witnesses who have no interest in the outcome of the litigation. This weighs heavily in favour of admitting their evidence. Mr. Kretschmer is prejudiced by propensity reasoning; that is, the use of the evidence to infer that he must have also misled the plaintiffs, but less so than in a criminal case. In addition, Mr. Kretschmer has known of the Shamins' evidence for a considerable period of time. He had ample time to prepare his defence to their allegations or preserve documents that would have supported his version of the statements made to them.

- [101] Having regard to the exceptional nature of similar fact evidence in civil cases, I find the probative value of the evidence far outweighs the prejudice Mr. Kretschmer may suffer as a result of propensity reasoning.
- [102] In light of the course of conduct adopted by Mr. Kretschmer with regard to the first tier purchasers and the continuation of this course of conduct with the Shamins, as second tier purchasers, I find the credibility of Mr. Kretschmer's evidence in this trial to be very suspect.
- [103] In addition, I find Mr. Kretschmer's version of the events subsequent to the execution of the contract with the plaintiffs to lack credibility for a number of other reasons. First, the entire premise of Mr. Kretschmer's version of the events is inconsistent with his testimony at trial. Mr. Kretschmer's testimony that he disclosed the Adams' claim against Lot 33 to the plaintiffs prior to the commencement of the Romfo Action is completely inconsistent with his evidence that he had no knowledge that the Adams were disputing the cancellation of their contract until December 2005. It is improbable that Mr. Kretschmer would inform the plaintiffs about legal opinions he had received concerning his right to re-sell Lot 33 when he understood the Adams had abandoned their claim to the lot.
- [104] Second, Mr. Kretschmer went to great lengths to convince the court that he had no knowledge of the Adams' claim to Lot 33 until the Romfo Action in December 2005. However, this position greatly undermined his credibility. The Adams had in fact sent Mr. Kretschmer's counsel a letter in July 2004 contesting the cancellation of their contract. In January 2005, they cashed their deposit cheque under protest and Mr. Kretschmer was given notice of this fact in February 2005. In addition, Mr. Kretschmer testified that it was the missing year on the plaintiffs' deposit cheque that led to his decision not to forward it to the lawyers for the Development. However, this testimony was inconsistent with his sworn evidence during discovery that the reason he did not forward the cheque to counsel in September 2005 was his knowledge that the Adams were contesting the cancellation of their contract.
- [105] Third, Mr. Kretschmer has repeatedly blamed his lawyers for either improvident legal advice or improper conduct as a means of avoiding responsibility for his actions. For example, Mr. Kretschmer attempted to avoid responsibility for his decision to cancel the contracts of the first tier purchasers by hiding behind privileged legal opinions he received from counsel. In addition, Mr. Kretschmer blamed his counsel in the Romfo Action for making improper admissions about his false statements to the first tier purchasers concerning the reason for cancelling their contracts. Lastly, Mr. Kretschmer blamed his previous lawyer in this action for retaining documents that could have proven the plaintiffs knew of the Adams' claim well before January 2007.
- [106] Fourth, Mr. Kretschmer is an experienced businessman who has been involved in real property development for many years. He knew the importance of documenting transactions and hired lawyers to draft and redraft the contracts for the Development. His

complete failure to document any of the important information he allegedly provided the plaintiffs seriously calls into question the credibility of his version of the events. It seems quite incongruous that an experienced businessman would fail to notify the plaintiffs in writing that there was a claim against the property they had purchased under a signed and fully executed contract.

- [107] Fifth, I find Mr. Kretschmer had a motive to fabricate the reason behind his failure to complete the contract with the plaintiffs. Due to delays in the approval process for the subdivision plan, and the increase in the costs of purchasing the land from his partners, Mr. Kretschmer and Tylon Steepe were under enormous financial pressure. Because of this need for additional funds Mr. Kretschmer took the extraordinary step of cancelling the contracts of first tier purchasers and re-offering the lots at vastly enhanced prices. When many of these purchasers balked at the new contracts and the higher prices, Mr. Kretschmer could not risk frightening away his second tier purchasers like the Shamins and the plaintiffs by disclosing this very real threat to the Company's ability to follow through with the sales to completion.
- [108] Sixth, Mr. Kretschmer's evidence was often inconsistent with his prior statements under oath or simply improbable. I found his evidence concerning the plaintiffs' decision to continue spending money on design work after being advised of the Adams' claim particularly improbable. He also exaggerated his testimony. For example, he testified there was a great deal of construction going on at the Development site in 2006; however, only two building permits were issued in that year.
- [109] Finally, there were many aspects of Mr. Kretschmer's evidence that were not put to the plaintiffs in cross-examination. For example, Mr. Kretschmer's testimony that he advised the plaintiffs in January 2006 that they should seek new legal counsel because Nixon Wenger LLP was involved in the Romfo Action. His evidence that before the plaintiffs signed the contract he told them about a legal opinion that stated he had a right to re-sell Lot 33. Mr. Kretschmer testified that he went through all of the terms of the contract with the plaintiffs before they signed it and suggested they get legal advice about the contract. The ratio of *Browne v. Dunn* (1893), 6 R. 67 (H.L.), is still good law: *R. v. Ali*, 2009 BCCA 464, and should be applied in this case to the detriment of Mr. Kretschmer's credibility.
- [110] While there are problems with the plaintiffs' evidence, I prefer their version of the events to that of Mr. Kretschmer's. The plaintiffs' inconsistencies are attributable to a faulty recollection of precise details that must be expected due to the length of time since the events. Further, their evidence as to how they were treated by Mr. Kretschmer is corroborated by the Shamins' testimony and the findings in the Romfo Action regarding the false representations made to the first tier purchasers. Lastly, while their continued faith in the veracity of Mr. Kretschmer's representations concerning the delays caused by the District of Lake Country may seem improbable, it must be remembered that the plaintiffs regarded Mr. Kretschmer as a friend and neither of them were experienced in real estate development. Moreover, they were absent from the Vernon area for long periods in 2005

and 2006. As a consequence, they were not able to keep a close watch on the progress of the Development.

- [111] I reject the defendants' argument that the plaintiffs' failure to allege deceit on the part of Mr. Kretschmer until their pleadings were amended in 2009 strikes a heavy blow to the veracity of their version of the events. I accept Mr. Roy's evidence that he angrily confronted Mr. Kretschmer about his false representations in a telephone call from Texas in January 2007, shortly after he discovered the true facts. The plaintiffs' continued contact with Mr. Kretschmer thereafter, between April and July 2007 when they commenced this action, was motivated by a desire to preserve their claim to Lot 33. It does not suggest that there had been no false representations by Mr. Kretschmer about the reasons their conveyance could not be completed.
- [112] Accordingly, I accept the plaintiffs' evidence that prior to January 2007 they had no knowledge of the Adams' claim to Lot 33; that prior to this date and, after the plaintiffs entered into the contract, Mr. Kretschmer falsely represented that the delay in completion of their contract was due to the District's failure to approve the subdivision plan when he knew this to be untrue; that Mr. Kretschmer falsely represented that the subdivision plan had not been registered when he knew that it had been in January 2006; that Mr. Kretschmer falsely represented that completion of their contract was delayed due to litigation with the District when he knew it was the Romfo Action that held up completion; and that Mr. Kretschmer fraudulently led the plaintiffs to believe that their contract was secure when he knew that the Adams had made a competing claim for ownership of Lot 33.

B. Claim in Deceit

- [113] In an action for deceit it is well established that the plaintiffs must prove on a balance of probabilities that Mr. Kretschmer made a false representation knowing that it was false; that he intended to deceive the plaintiffs by making the false statement; and that the false statement induced the plaintiffs to act to their detriment. In regard to the last element of the tort, the Court of Appeal concluded in *Sidhu Estate* at paras. 36 and 42, that the plaintiff is not required to prove the false statements were the sole inducement but only a material factor; and, further, once the intentional nature of the false statements, materiality and causation of the loss are proven, the burden of proof regarding non-reliance shifts to the defendant. The shifting of the burden of proof in these circumstances was confirmed by the Court of Appeal in this action: Roy at paras. 38-39.
- [114] I have found that Mr. Kretschmer made false representations to the plaintiffs knowing that they were untrue at the time. Further, it is apparent that due to the nature of the false statements concerning the reason for the delay in the completion of the plaintiffs' contract, Mr. Kretschmer intended to deceive the plaintiffs as to the true state of affairs concerning title to Lot 33.

- [115] In addition, I find the false representations regarding Lot 33 were a material factor behind the plaintiffs' decision to continue waiting to be notified of their completion date instead of seeking an alternate property on which to build their home. In my view, had the plaintiffs been advised of the true facts in the fall of 2005, it is highly likely they would have abandoned their contract and taken steps to find a comparable property before the market values had increased beyond the point that they could afford to do so.
- [116] I am also satisfied the plaintiffs have suffered a loss that was caused by Mr. Kretschmer's false representations. In particular, the plaintiffs lost the opportunity to purchase another property comparable to Lot 33 in 2005 when the prices were significantly lower. They lost the opportunity to seek legal advice with respect to their rights under the contract in a timely way. Lastly, they lost the benefit of their time, efforts and \$2,000 by committing these to design plans for a house on Lot 33 when the viability of those plans was seriously in doubt.
- [117] Having established the false representation, materiality and causation of loss, I find the burden shifts to Mr. Kretschmer to show that the plaintiffs did not rely on his false representations to their detriment. In this regard, Mr. Kretschmer argues that the plaintiffs' failure to sue on the contract immediately upon becoming aware of the deceit establishes that they affirmed the contract and essentially "forgave" the deceit. Knowing the true facts, the plaintiffs decided to wait and see whether the Adams were successful in their litigation rather than pursue a claim for deceit and breach of contract. Further, the defendants argue the election of the plaintiffs at trial to claim damages in lieu of specific performance is further evidence that they affirmed the contract.
- [118] In my view, the plaintiffs' conduct after January 2007 does not amount to an election to forgo an action against Mr. Kretschmer for deceit. The plaintiffs' decision to await the outcome of the Romfo Action is independent of their right to sue Mr. Kretschmer for damages caused by deceit. While the deceit is related to the contract, it did not induce the contract thereby presenting the plaintiffs with the option to sue for breach of contract or continue to seek specific performance. Instead, Mr. Kretschmer's false representations prevented the plaintiffs from making informed and timely decisions about whether they should abandon their claim to Lot 33 and buy another property. The plaintiffs' claim against the Company for breach of contract is not dependent upon the deceit perpetrated upon them by Mr. Kretschmer. The breach of contract claim is based on the Company's failure to complete the transaction because the property had already been sold to the Adams.
- [119] The following statement by the court in Sorensen at 208-209, cited with approval in Dimitriadis v. Bowen Valley Ranch Corp., [1995] B.C.J. No. 2281 at para. 23 (S.C.), is applicable to this case:

I am also of the opinion that the law relating to the rights of a party to a contract to accept or reject repudiation by the other party irrelevant to this appeal. The claim here is not for damages for breach of contract or of any provision of a contract. It is a Derry v. Peek (1889), 14 App. Cas.

337 (H.L.), action of deceit. The action is available to the respondents in spite of the fact that the sale and purchase were completed. In order to succeed, however, nothing short of proof of a fraudulent intention to deceive in the strict sense will suffice: vide *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.).

[120] Further support for my conclusion that the action in deceit may proceed is supported by the findings in *Barron Estate v. Kelly* (1918), 56 S.C.R. 455 at 478-479, where the Supreme Court of Canada stated:

It is also elementary that a party misled by such misrepresentations as the evidence here establishes has, upon discovery of their falsehood, the choice of repudiating his contract - and (if *restitutio in integrum* be practicable) he may thereupon claim the equitable relief of rescission with reimbursement - or of affirming it and pursuing the common law remedy of damages in an action of deceit. The present plaintiff seeks rescission. He claims damages only alternatively, i.e. if not entitled to rescission. His right to this alternative relief, although he should have lost his right to rescission, is, in my opinion, incontestable.

[121] The authorities relied upon by the defendants are distinguishable from the case at hand. *Burrows* and *K.R.M.* are illustrative of situations in which the contract is induced by deceit and the innocent party elects to continue performing under the contract when the true facts are known. Even in these circumstances the innocent party can elect to affirm the contract and sue for deceit or elect to rescind the contract and sue for damages: *K.R.M.* at 21.

[122] In my view, the actions of the plaintiffs after January 2007 are only relevant if it proves that they did not rely upon the false representations by Mr. Kretschmer to their detriment or failed to mitigate their loss. The plaintiffs did not immediately repudiate the contract in the face of the defendants' inability to complete and purchase another comparable property. Instead, the plaintiffs adopted a wait and see approach regarding the Adams' claim to Lot 33 in the hopes that they may still be able to purchase this lot. Consistent with this choice, the plaintiffs sued for specific performance and damages (implicitly in the alternative) in July 2007. By 2007, the plaintiffs could not afford to re-enter the market due to the increase in property values and the cost of construction since 2005. Mr. Lonsdale's appraisals indicate that between August 2005 and November 2007 the value of Lot 33 went from \$200,000 to \$500,000 and the cost of construction went from \$100 a square foot to \$140. This significant change in circumstances precludes any retrospective inference that the plaintiffs would have adopted the same wait and see approach had they learned of the Adams' claim to Lot 33 in the fall of 2005. The fact they did not purchase another lot was due to their inability to afford the increased prices of property and construction. It is not evidence that the plaintiffs would have taken no different steps had they known the true facts in the fall of 2005.

[123] Nor does the plaintiffs' delay in commencing an action against the defendants lead to an inference that they did not rely on Mr. Kretschmer's deceit to their detriment. I infer nothing from the delay between the date the plaintiffs were notified of the Romfo Action

and the commencement of this action. The plaintiffs did not return from Texas until late April 2007. They sought legal advice and the writ and statement of claim was issued three months later. This is not an unreasonable timeframe within which to commence an action. While the deceit claim was not added until 2009, this cause of action arose out of the same circumstances in which the plaintiffs' rights had crystallized with the commencement of the action in 2007. Further, I have rejected the defendants' argument that the delay in amending the claim to add deceit as a cause of action reflects negatively on the credibility of the plaintiffs' evidence that Mr. Kretschmer lied to them. In this regard, I accepted Mr. Roy's evidence that he angrily confronted Mr. Kretschmer about the deceit in a telephone conversation that occurred in January 2007, shortly after he learned about the Adams' claim.

- [124] For the same reasons, the actions of the plaintiffs after learning of the Adams' lawsuit do not evidence a failure to mitigate. Without the financial means to purchase a comparable lot in January 2007, the plaintiffs cannot be expected to do so in order to mitigate. The only reasonable course of action was to wait until the court determined whether the Adams had a right to specific performance of their contract to purchase Lot 33. In my view, the plaintiffs' financial limitations and the drastic change in real estate values give rise to an exception to the duty to mitigate: Mann at paras. 33-34.
- [125] Damages for deceit are based on the principle that the plaintiffs are entitled to be put in the position they would have been in if the false representations had not been made. In addition, it has been recognized by the Court of Appeal that damages for deceit can include consequential loss if the loss flows directly from the false representations and is not too remote: per Nemetz C.J.B.C. in K.R.M. at 28-29.
- [126] Mr. Kretschmer became aware of the Adams' claim in the fall of 2005 at the latest. Had he immediately informed the plaintiffs of this claim the plaintiffs would have been able to re-enter the market and purchase a comparable property at that time. Their loss is thus the difference between the value of Lot 33 in the fall of 2005 compared to the value of the lot when the plaintiffs were notified of the Adams' action. I do not accept the plaintiffs' submission that the value of Lot 33 at the date of the Court of Appeal decision in the Romfo Action is the appropriate comparison. This may be the date of the breach in an action on the contract because the Court of Appeal's decision precluded the vendors from completing the plaintiffs' contract; however, I believe the plaintiffs' right to damages crystallized when they learned the true facts.
- [127] Mr. Lonsdale's appraisals of Lot 33 provide the court with a definite value for the property as of August 2005 and November 2007. Although there is no specific value for the property as of late January 2007, when the plaintiffs first learned of the Adams' lawsuit, it is reasonable to infer that the market value of Lot 33 was close to the value indicated in Mr. Lonsdale's appraisal dated November 1, 2007. The plaintiffs testified that the market value of properties in the Vernon area rapidly increased between 2005 and 2007. Mr. Kretschmer did not disagree. Moreover, he introduced no evidence to contradict Mr. Lonsdale's

appraisals of Lot 33.

- [128] I am not satisfied that the plaintiffs should also receive the difference between the value of an improved lot in 2005 and 2007. These damages are too remote. There is no evidence as to the cost of the home to be constructed on Lot 33 and the drawings commissioned by the plaintiffs were only preliminary sketches. The contract also provided that Tylon Steepe would construct the home without any fixed cost or pricing formula. In my view, the plaintiffs' plans regarding a home were not far along. No construction had commenced. The plaintiffs could have sold the lot as soon as their contract completed. Whether the plaintiffs had the funds to complete construction of a home and what type of home is unknown. Thus it is not appropriate to award damages based on the difference in value of an improved lot.
- [129] Lastly, I am not satisfied the plaintiffs are entitled to damages based on the difference between the value of their Hillside home at the time of its sale in March 2005 and its market value at the date of the Court of Appeal judgment. The plaintiffs did not sell their home based on any false representations by Mr. Kretschmer. Their claim for deceit relates solely to false representations made after the contract was signed.
- [130] The plaintiffs are also entitled to be reimbursed for the monies paid to Mullins for design drawings. This is a loss directly related to Mr. Kretschmer's false representations. Had the plaintiffs known of the Adams' claim, they would not have continued to have drawings prepared after the fall of 2005.
- [131] Accordingly, I award damages against Mr. Kretschmer in the amount of \$300,000, which is the difference in the value of Lot 33 between August 2005 and late January 2007. Further, I award damages in the amount of \$2,000 for the design drawings.

C. Breach of Contract

- [132] The defendants admit that the contract with the plaintiffs was breached because they were unable to complete the sale of Lot 33 due to the Adams' successful action for specific performance. They argue, however, that the plaintiffs' damages are limited to their damage deposit, which was never negotiated.
- [133] The plaintiffs agree that clause 1.2(b) of the contract, which limits the Company's liability to the purchaser's damage deposit, applies to the facts of this case. However, the plaintiffs argue they are exempt from the impact of this contractual provision because the contract at its inception was unconscionable and to enforce it in the circumstances would be contrary to public policy.
- [134] The plaintiffs' claim for damages arising out of the fundamental breach of contract by the Company depends upon the proper application of Tercon. In that case, the Province of B.C. issued a request for tenders for the construction of a highway. It was a term of the request for proposals that no party responding to the request could claim compensation for

submitting a proposal. The Province stipulated that only the parties who had bid on the initial request for road design proposals were eligible to bid on the construction of the highway. The contract was ultimately awarded to a party that was not an eligible bidder. Tercon sued and was awarded damages at trial despite the limitation of liability clause. The Court of Appeal reversed the trial judgment and the Supreme Court allowed Tercon's appeal. Even though four judges dissented, the Supreme Court was unanimous that a fundamental breach could no longer be the basis for exempting an aggrieved party from a clause limiting the wrongful party's liability. Instead, the exclusion clause will not be valid if it was unconscionable at the time the contract was made. If the clause is not unconscionable and therefore valid at the time of contract formation, the court may nevertheless refuse to enforce the limitation of liability clause because of an overriding public policy concern.

- [135] The circumstances in which the court may exempt an aggrieved party from a contractual exemption clause are articulated by Binnie J., who dissented in the result, at paras. 117-120:
- [117] As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the entire contract, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the breach, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.
- [118] There are cases where the exercise of what Professor Waddams calls the "ultimate power" to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.
- [119] A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650. The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to

degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that "a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause" (para. 53). (See also *McCamus*, at p. 774, and *Hall*, at p. 243.) What was demonstrated in *Plas-Tex* was that the defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

- [120] Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract.
- [136] Further, Binnie J. adopts the comments by Dickson C.J. in *Hunter Engineering* regarding the application of unconscionability to limitation of liability clauses at para. 108 of *Tercon*:
- [108] Dickson C.J. (La Forest J. concurring) observed that the doctrine of fundamental breach had "spawned a host of difficulties" (p. 460), the most obvious being the difficulty in determining whether a particular breach is fundamental. The doctrine obliged the parties to engage in "games of characterization" (p. 460) which distracted from the real question of what agreement the parties themselves intended. Accordingly, in his view, the doctrine should be "laid to rest". The situations in which the doctrine is invoked could be addressed more directly and effectively through the doctrine of "unconscionability", as assessed at the time the contract was made:

It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, [p. 117] should the courts interfere with agreements the parties have freely concluded. [p. 462]

- [137] In *Roy* at para. 30, the Court of Appeal held that Binnie J. did not alter the basic tests for unconscionability in *Tercon*. Further, the Court of Appeal summarized the two-pronged test of unequal bargaining power and contract unfairness at para. 29:

[29] The Vendor has cited several case and text authorities discussing the elements of unconscionability. It is sufficient for our purposes to set out the following from the reasons of Madam Justice McLachlin (as she then was) in *Principal Investments Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 at 263, 37 D.L.R. (4th) 398 (C.A.):

Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrison v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).

[138] In my view, the plaintiffs cannot succeed on the first prong of the test for an unconscionable bargain. While they had no knowledge of the Adams' challenge to the cancellation of their contract when they signed the agreement, there was no inequality of bargaining positions as contemplated by the doctrine of unconscionability. To render the contract or the limitation clause invalid there must be evidence that the aggrieved party was in the control or power of the other party to the extent that their will is overborne. Typical examples include ignorance of the contract terms due to illiteracy, blindness, and senility of the weaker party. Certainly the plaintiffs had limited choices available to them. They had sold their Hillside home and were living in a basement suite. However, they understood that they could choose not to sign the contract. They had an opportunity to read the contract and there is no evidence that they misunderstood its terms or even vigorously opposed them. It was a "take it or leave it" contract and the vendors would not negotiate changes to its provisions. Nevertheless, the plaintiffs could still have walked away from the contract without any further obligation to the defendants.

[139] I am also satisfied that the plaintiffs cannot succeed on the second prong of the test for unconscionability. As Dickson C.J. says in *Hunter Engineering* at 461, exclusion clauses are an accepted part of commercial contractual relationships. It is good business practice to contract regarding the consequences of deficient performance and, like all other terms of the contract, clauses that limit a party's liability may be reflected in the price paid by the purchaser. Without a limitation of liability clause, the defendants were at risk of substantial economic loss in the event they were unable to complete the sale. The District of Lake Country could ultimately refuse their subdivision application or the banks could decide to call their loans. This is not a case where the plaintiffs were unaware of the terms of the contract they signed.

[140] I thus find that the exemption clause was not unconscionable and is therefore valid and enforceable.

- [141] The question remains whether the court should exercise its discretion to refuse to apply the limitation clause due to an overriding public policy concern. This discretion must be exercised rarely and only in the most egregious circumstances, which "approach criminal behaviour or egregious fraud". The public policy concerns must be clear and unambiguous and give rise to an unquestionable duty on the court to curb the abuse perpetrated by the party seeking to hide behind the limitation clause.
- [142] In this case, Mr. Kretschmer, as agent for the Company, withheld important information from the plaintiffs prior to the signing of the contract. At this time Mr. Kretschmer knew that the Adams had objected to the cancellation of their contract and had threatened legal action. This fact was not disclosed to the plaintiffs before they signed the contract. In my view, although Mr. Kretschmer's lack of disclosure could amount to fraud, it cannot be said that Mr. Kretschmer's conduct amounted to egregious fraud. Had the Adams commenced legal proceedings before the plaintiffs signed the contract, and Mr. Kretschmer failed to disclose this information to the plaintiffs, it would be a far more serious case of fraud warranting intervention by the courts. It is readily apparent that there are strong public policy reasons for precluding a developer from escaping liability when he knowingly sells property that is subject to litigation alleging a competing claim to ownership without disclosing this information to an unsuspecting purchaser.
- [143] The more serious misconduct in this case occurred after the contract was executed. Mr. Kretschmer deceived the plaintiffs regarding his inability to complete the transaction throughout the balance of 2005 and 2006. Again, although serious misconduct, Mr. Kretschmer's actions do not approach criminal behaviour or constitute egregious fraud. His conduct is not of the same nature or quality as the examples used by Binnie J. in *Tercon* at paras. 118-119 to illustrate situations in which the court would refuse to apply a limitation clause.
- [144] The plaintiffs are not left without a remedy. I have awarded them damages for deceit. The court cannot routinely exercise its discretion to exempt an innocent party from a clause such as 1.2(b) where there has been fraud in the inception of a contract or in its breach. This discretion must only be exercised in the rarest of cases to reflect the importance of freedom of contract and certainty in business relationships. This is not one of those rare cases.
- [145] For these reasons I find the Company may rely on clause 1.2(b) of the contract to limit its liability to the return of the plaintiffs' deposit. The plaintiffs acknowledge that their deposit cheque has never been cashed. Accordingly, no damages are awarded for breach of contract.

D. Costs

[146] I find the Company is entitled to its costs against the plaintiffs for this trial, as well as the trial before Josephson J., Rogers J. and Betton J. The Company was ultimately successful in its claim that clause 1.2(b) of the contract was a complete answer to the plaintiffs' claim for breach of contract.

[147] I find the plaintiffs are entitled to their costs against Mr. Kretschmer for this trial, as well as the trial before Josephson J., Rogers J. and Betton J.

[148] The plaintiffs were ultimately successful in their claim against Mr. Kretschmer for deceit. The plaintiffs ask for special costs; however, no authority is cited in support of this application. Special costs are awarded where a litigant engaged in reprehensible conduct: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 8. Mayer also lists the following circumstances where special costs may be ordered:

[11] ...

- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
- (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
- (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- (d) where a party made the resolution of an issue far more difficult than it should have been;
- (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
- (d) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- (e) where a party brings a proceeding for an improper motive;
- (f) where a party maintains unfounded allegations of fraud or dishonesty; and
- (g) where a party pursues claims frivolously or without foundation.

[149] Special costs are not routinely ordered in a case of deceit or fraud, except as listed above where the claim is an unwarranted claim of fraud in which case special costs may be awarded against the party making the improper allegation: *Shah v. Bakken*, [1999] B.C.J. No. 1835 at para. 13 (S.C.); and *Dimitriadis* at paras. 27-31. The plaintiffs do not allege any inappropriate conduct in the course of the litigation. There are no special circumstances that would justify special costs for other reasons. Thus I am unable to make an order for special costs.

[150] The parties agree that I have jurisdiction to consider a costs award in the Court of Appeal action. I note that the parties were equally successful in this appeal. The plaintiffs' cross appeal against the dismissal of their cause of action in deceit was successful and the defendants successfully appealed the trial judge's award of damages for breach of contract. Accordingly, I order that the parties each bear their own costs.

"Bruce J."

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